

Is the Organisation of National Judiciaries a Purely Internal Competence?

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On 26 January 2018, Jarosław Kaczyński, Poland's de facto leader (which in itself is a rather unhealthy sign in a democracy), claimed that what he refers to as judicial "reforms" would not be an EU matter but rather an "internal competence guaranteed by EU law".

This point had been previously repeated ad nauseam by Polish officials. For instance, in a statement issued on 27 July 2017, the Polish Ministry for Foreign Affairs argued that "the manner in which the judiciary is organized lies in the competence of Member States and their bodies take decisions on this matter as part of their political process and according to national legislative procedures." (Strangely enough, for all of its nationalism, this statement does not mention Article 173 of the Polish Constitution which states: "The courts and tribunals shall constitute a separate power and shall be independent of other branches of power.")

Repeating one's point does not necessarily make it correct regardless of the number of times it is repeated. This goes for the argument that the EU cannot review how its Member States organise their national judiciaries (not to mention the fact one cannot justify obvious violations of the rule of law just by calling them "reforms"). While it is correct to point that the EU lacks a general legislative power to harmonise the way national judiciaries are organised, the "national sovereignty" argument fails to take any account of the EU Member States' legal obligation under the EU Treaties to respect principles such as the rule of law. In the words of Professor Hillion:

As an objective of the Union, and as a cardinal aim of its institutional framework, respect for the values of Article 2 TEU in general, and of the rule of law in particular, entails obligations of conduct for the Member States. Following the principle of sincere cooperation enshrined in Article 4(3) TEU, they shall 'facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives. Such an obligation of cooperation is all the more significant since the European Court of Justice acknowledges it as a self-standing requirement, which applies irrespective of the nature of EU and Member States' competence.

Because the EU's "legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded" (CJEU, Opinion 2/13), national authorities cannot hide behind arguments about "national sovereignty" or "the will of the people" to prevent EU action when they fundamentally undermine the independence and impartiality of national courts.

Indeed, as pointed out by Frans Timmermans, "national judges are EU judges. They apply EU law directly. They also have a direct unimpeded access to the European Court of Justice" and the EU legal system "will not function if this direct access is blocked because

there is a political filter or political interference by government”. To borrow the more colourful phrasing used by Věra Jourová, “the judicial system in the EU is like a chain of Christmas lights. When one light goes off, others don’t light up and the chain is dark”.

The European Commission was therefore right to stress that while “it is up to Poland to identify its own model for its justice system [...] it should do so in a way that respects the rule of law”, which means inter alia not adopting measures that enable a ruling party to systematically and politically “interfere with the composition, the powers, the administration and the functioning of these authorities, thereby rendering the independence of the judiciary completely moot”.

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